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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. .....

UNITED STATES STEEL CORPORATION *et al.*,
Petitioners

v.

UNITED MINE WORKERS OF AMERICA *et al.*,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT and APPENDICES

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

United States Steel Corporation, Jones & Laughlin Steel Corporation, Bethlehem Mines Corporation, and Republic Steel Corporation, petitioners, respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit entered in the above-entitled consolidated cases on February 3, 1972, in which the court reversed the District Court's order which had denied respondents'[1] motion for award of reasonable costs, expenses and attorneys' fees.

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1. Respondents are individually designated in the caption of the opinion of the Court of Appeals set forth in Appendix B, *infra*, pp. 26-30.

Questions Presented.

OPINIONS BELOW

The opinion of the District Court for the Western District of Pennsylvania, entered September 30, 1970, is reported at 317 F.Supp. 1070 (Appendix A, *infra*, pp. 21-25). The opinion of the United States Court of Appeals for the Third Circuit (Appendix B, *infra*, pp. 26-53) is reported at —— F.2d ——, and was filed on February 3, 1972.

JURISDICTION

The judgment of the Court of Appeals (Appendix C, *infra*, p. 54) was entered on February 3, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

The jurisdiction of the District Court was by virtue of 29 U.S.C. § 185.

QUESTIONS PRESENTED

Four employers sought and obtained preliminary injunctions under § 301 of the Labor-Management Relations Act of 1947, as amended (29 U.S.C. § 185) to enjoin a strike over an arbitrable dispute. They posted injunction bonds pursuant to Federal Rule 65 (c) totalling $4,000 conditioned to pay "costs and damages" incurred by any party found to have been wrongfully enjoined. The preliminary injunction was reversed and remanded for a hearing *de novo* on the merits. At that hearing, the injunction proceedings were, by agreement of the parties, continued indefinitely because the work stoppage

had ended. Thereafter, the defendant unions filed a motion for reasonable attorneys' fees and expenses under § 7 of the Norris-LaGuardia Act (29 U.S.C. § 107). The amount of such attorneys' fees and expenses substantially exceeded the aggregate amount of the injunction bonds. The questions presented for determination are:

1. Whether the bond provisions of § 7 of Norris-LaGuardia, which provide for the payment of reasonable attorneys' fees and expenses, are applicable where an injunction is sought and obtained under § 301 to enjoin a strike over an arbitrable dispute;

2. Whether any recovery may be had on an injunction bond when there has been no decision on the merits as to the employers' right to injunctive relief;

3. Whether attorneys' fees are recoverable on a bond posted in a § 301 injunction action pursuant to Federal Rule 65 (c) and conditioned only to pay "costs and damages"; and

4. Whether employers who obtain an injunction under § 301 may be held liable for an amount in excess of that specified in the bonds posted pursuant to Federal Rule 65 (c) and approved by the District Court.

STATUTES AND RULES INVOLVED

The statutory provisions and rules involved are: Section 7 of the Norris-LaGuardia Act, 47 Stat. 71, 29 U.S.C. Section 107; Section 301 of the Labor-Management Relations Act of 1947, as amended, 61 Stat. 156, 29 U.S.C. Section 185(a); and Federal Rule of Civil Procedure 65 (c). They are printed in Appendix D, *infra*, pp. 55-57.

STATEMENT OF THE CASE

On June 22, 1970, petitioners, United States Steel Corporation, Jones & Laughlin Steel Corporation, and Bethlehem Mines Corporation[2] filed actions under Section 301 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. § 185 (the "Act"), to enjoin the respondents from engaging in work stoppages over disputes which were subject to resolution through the Settlement of Local and District Disputes procedure of the National Bituminous Coal Wage Agreement of 1968.

After a hearing on petitioners' applications for preliminary injunctions, the District Court by orders dated June 24, 1970 (R. 35a, 39a and 48a)[3] as amended on June 25, 1970 (R. 37a, 46, 49a and 51a), preliminarily enjoined the respondents from engaging in, or continuing to engage in, work stoppages at petitioners' mines; from picketing, or in any other manner interfering with the orderly resumption of, or continuation of, operations; and directed respondents, their officers, representatives and members to utilize the Settlement of Local and District Disputes procedure of the labor agreement for the resolution of any grievances, differences or local trouble at petitioners' mines. Each of the four orders further provided that "Bond in the amount of $1,000 has been approved and filed with the Court by plaintiff." (R. 38a, 47a, 50a and 52a).

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2. On June 25, 1970, petitioner Republic Steel Corporation filed a similar action under Section 301 seeking the same relief.

3. All references to the appendix filed by respondents in the Court of Appeals are designated "R. . . . .a".

Each of the petitioners filed a bond pursuant to Rule 65(c) of the Federal Rules of Civil Procedure, the condition of the bond being that "the plaintiff shall be liable to the defendants for such costs and damages, not exceeding the sum of $1,000.00, as defendants or any other person may sustain by reason of the Preliminary Injunction, if the Court finally decides that plaintiff is not entitled thereto."[4] No complaint was made by the respondents to the District Court as to the conditions or the amount of the bond.

Respondents filed immediate appeals from the orders granting the preliminary injunctions, and on June 30, 1970, the United States Court of Appeals for the Third Circuit summarily reversed and remanded these cases to the District Court "without prejudice to a request for a hearing *de novo* on the application for a preliminary injunction" (R. 71a). The court stated that it was taking this action "because we find that the parties were effectively denied the opportunity to develop their respective positions by erroneous rulings of the[District] Court" (R. 66a), and emphasized that "we have not reached the issue of the merits of the request for a preliminary injunction" (R. 71a).

On July 9, 1970, pursuant to the order of remand, the District Court commenced a *de novo* hearing on petitioners' application for a preliminary injunction, and on the following day, based upon certain representations

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4. See R. 40a for the injunction bond given in Civil Action No. 70-725; the bonds given by petitioners and approved by the District Court in Civil Action Nos. 70-724, 70-727 and 70-728 are identical in every material respect.

and stipulations of counsel for the respective parties,[5] the District Court entered an order continuing the hearing until further notice by the court (R. 76a).

On August 14, 1970, respondents filed their Motion for Award of Reasonable Costs, Expenses, and Attorneys' Fees (R. 78a). After a hearing, the District Court in an opinion dated September 30, 1970, denied the motion (R. 139a). The court concluded that insofar as the motion related to expenses and attorneys' fees incurred in connection with the appeal, the order of the Court of Appeals prescribing that each party was to bear its own costs was dispositive of the question of costs on appeal (R. 142a). The District Court also concluded that the requests for costs, expenses and attorneys' fees incurred by the respondents in opposing the requests for the preliminary injunction in the District Court should be denied as being prematurely made, since there had been no final determination of ~~respondents~~ petitioners' claims for injunctive relief (R. 142a). These conclusions by the District Court made it unnecessary for the court to decide whether the terms of Section 7 of the Norris-LaGuardia Act, 29 U.S.C. § 107, requiring security for reasonable attorneys' fees and legal expenses must be read into a bond filed precedent to the issuance of an injunction against

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5. These stipulations were that to the knowledge of the defendants no picketing, work stoppage or strike existed at the time, and none was known to be anticipated in the immediate future, and that the plaintiffs, in good faith, would utilize their best efforts to comply with the Federal Coal Mine Health and Safety Act of 1969 and counsel for the respective defendants would counsel the officers and members of the defendant unions to refrain from any work stoppage or picketing at plaintiffs' mines (R. 76a).

concerted activity alleged to be in violation of a collective bargaining agreement (R. 143a).

On October 21, 1970, respondents appealed from the order of the District Court denying their motion for costs, expenses and attorneys' fees. Thereafter, on December 10, 1970, petitioners filed a motion to dismiss the appeals on the ground that the order, which denied respondents' motion without prejudice as premature, was not a final order. On January 12, 1971, the Court of Appeals denied petitioners' motion to dismiss without opinion.

In its opinion of February 3, 1972, reversing the decision of the District Court, the Court of Appeals treated the stipulation continuing the hearing on the application for a preliminary injunction as ending the lawsuit for all practical purposes because the work stoppages complained of had ceased (Appendix B, p. 33). It did so, even though answers and counterclaims were subsequently filed by certain of the respondents and the case will eventually come up for final hearing (R. 6a, 14a, 23a, 33a).

The Court of Appeals held that the bond provisions of § 7 of the Norris-LaGuardia Act, that a plaintiff shall file an undertaking for loss, expense, or damage, including costs, together with a reasonable attorneys' fee before a preliminary injunction can issue in a labor dispute, apply in a federal court even when, as here, the injunction is sought under § 301 of the Labor-Management Relations Act of 1947, as amended (Appendix B, p. 40). The Court of Appeals further held that if, in a labor dispute, the plaintiff seeking a preliminary injunction tenders, and the district court approves, a bond

conditioned for "costs and damages", that undertaking must be construed to include all the elements of damage which are recoverable under § 7 of Norris-LaGuardia, including attorneys' fees (Appendix B, p. 43). Finally, the Court of Appeals held (with one judge dissenting) that in any case involving a labor dispute, including an action for an injunction sought under § 301, the liability of the plaintiffs, though not of the surety, for loss, expense or damage, including attorneys' fees, under §7 of Norris-LaGuardia, must be fixed by the district court without regard to any limitation in the injunction bond (Appendix B, p. 50).

Judge Kalodner, while concurring in the reversal of the District Court's order, dissented from the majority's direction to the District Court to enter a judgment against petitioners in the injunction proceedings for an amount in excess of that stipulated in the injunction bonds. In the dissenting judge's view, when defendants seek recovery of their reasonable attorneys' fees and expenses in the same proceedings in which the preliminary injunctions were improvidently issued, they are limited in their recovery, by virtue of § 7(e) of Norris-LaGuardia, to the amounts specified in the injunction bonds (Appendix B, p. 51); and he termed the majority's construction of § 7(e) in permitting recovery in the same proceedings of an amount in excess of the injunction bonds as "impermissible judicial legislation" (Appendix B, p. 53).

The effect of the majority's decision was to hold petitioners liable under § 7 of Norris-LaGuardia to respondents and certain other parties to the litigation not

involved in this petition for certiorari[6] for approximately $11,350 in attorneys' fees and expenses, even though there has never been a decision on the merits that petitioners were not entitled to the injunctive relief they sought under § 301, and even though the bonds they posted under Federal Rule 65(c) were conditioned only to pay "costs and damages", and the aggregate amount of the injunction bonds was only $4,000.

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6. On February 28, 1972, the same panel, in a *per curiam* opinion (with Judge Kalodner again concurring in part and dissenting in part), reached the same conclusions with respect to the remaining parties to this litigation. *Bethlehem Mines Corporation, et al. v. United Mine Workers, et al.*, —— F.2d ——, 79 LRRM 2816. Petitioners also intend to file a petition for certiorari with respect to this decision by the Court of Appeals.

REASONS FOR GRANTING WRIT

1. This case raises an important question of federal law which has not been, but should be, settled by this Court. In *Boys Markets v. Retail Clerks Union, Local 770,* 398 U.S. 235 (1970), this Court held that, notwithstanding the anti-injunction provisions of § 4 of the Norris-LaGuardia Act, a federal court has jurisdiction under § 301(a) of the Labor-Management Relations Act of 1947, as amended, to enjoin a strike over an arbitrable grievance. The present case involves the undecided question as to whether the bond provision of § 7 of the Norris-LaGuardia Act applies to an action brought under § 301(a) in which an employer seeks and obtains a preliminary injunction barring a strike over an arbitrable grievance.

In reaching the conclusion in *Boys Markets* that the literal terms of § 4 of the Norris-LaGuardia Act must be accommodated to the subsequently enacted provisions of § 301(a) of the Labor-Management Relations Act of 1947, as amended, this Court pointed out that the Norris-LaGuardia Act "was responsive to a situation totally different from that which exists today" (398 U.S. at 250). However, this Court emphasized that its holding was a narrow one, dealing "only with the situation in which a collective bargaining contract contains a mandatory grievance adjustment or arbitration procedure" (398 U.S. at 253), and it adopted from the dissenting opinion in *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195 (1962), certain guidelines to be followed by a federal court in determining whether an injunction would be appropriate despite the Norris-LaGuardia Act.

Reasons for Granting Writ.

While this Court, in *Boys Markets,* was dealing specifically with §4 of the Norris-LaGuardia Act, the same rationale is applicable to the bond provision contained in § 7 of that Act. If the district court, on the basis of the principles adopted in *Boys Markets,* determines that the case is one in which an injunction would be appropriate despite Norris-LaGuardia, that Act—and this includes § 7 — has no application.

The Court of Appeals improperly interpreted *Boys Markets* as relating only to § 4 of the Norris-LaGuardia Act and to no other provision of that Act, and erroneously concluded that every other provision of Norris-LaGuardia applies to a § 301 injunction action, even though it recognized that "some of the specific findings of fact required by § 7 are inappropriate in a §301 case" (Appendix B, p. 39).

One of the principal factors which prompted this Court to reverse *Sinclair* was its desire to re-establish the federal policy of labor law uniformity under § 301 expressed in *Teamster Local 174 v. Lucas Flour Co.,* 369 U.S. 95 (1962). The decision of the Court of Appeals in this case offends that policy of uniformity.

Section 7 of the Norris-LaGuardia Act provides that an employer obtaining an injunction must post a bond to compensate the union for any loss, expense or damage caused by the improvident or erroneous issuance of the injunction, including attorneys' fees incurred in defending against the injunction. While, as this Court noted in *Boys Markets* (398 U.S. at p. 247, n. 15), one half of the states have enacted so-called "little Norris-LaGuardia Acts", only eight of them have bond provisions expressly requiring the payment of attor-

neys' fees as in § 7 of the Norris-LaGuardia Act.[7] Thus, the decision of the Court of Appeals will serve to recreate the very lack of uniformity found offensive in *Boys Markets* and, at least in those states which do not have bond provisions similar to §7 of Norris-LaGuardia, will undoubtedly cause a return to the use of removal proceedings under 28 U.S.C. §1441 and to maneuvering from one court to another which will, again, "frustrate any relative uniformity in the enforcement of arbitration agreements" (398 U.S. at 246).

2. In deciding that the respondents were entitled to recover on the injunction bonds even though there has not been a decision on the merits as to petitioners' right to injunctive relief, the Court of Appeals decided a federal question in a way which substantially conflicts with the decision of this Court in *Lawrence v. St. Louis-San Francisco R. Co.,* 278 U.S. 228 (1929), and with the decisions of the Courts of Appeal for the Ninth and District of Columbia Circuits in *Janssen v. Shown,* 53 F.2d 608 (9th Cir. 1931), and *Meeker v. Stuart,* 298 F.2d 902 (D.C. Cir. 1961), affirming 188 F.Supp. 272 (D.D.C. 1960). These cases all hold that there can be no recovery of damages caused by the issuance of a preliminary injunction, even if set aside, unless final judgment after trial is in favor of the party who has been enjoined. See, also, *Madison Shipping Corp. v. National Maritime Union,* 204 F.Supp. 22 (E.D. Pa. 1962).

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7. See Hawaii Rev. Laws, Act 200, §7, L. (1963); Mass. Laws Ann., ch. 214, §9A (1955); Minn. Stat. Ann., No. 13A, §185.13 (1966); N.J. Stat. Ann., 2A, Ch. 15, §52 (1952); N.Y. Consol. Laws, Lab. §807.3 (McKinney Supp. 1965); Nth. Dak. Cent. Code Ann., Vol. 7, 34-08-08 (1961); Pa. Stat. Ann., tit. 43, §206 (j) (1964); and Utah Code Ann., 34-19-5 (1971).

The Court of Appeals improperly concluded that the effect of the stipulation of July 10, 1970, continuing the hearing on petitioners' application for a preliminary injunction, was to end the lawsuit because by then the work stoppage complained of had ceased. In essence, then, the Court of Appeals treated the case as being moot. It is well settled, however, that an issue remains "live" unless subsequent events make it absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur: *United States v. Concentrated Phosphate Export Ass'n., Inc.*, 393 U.S. 199, 203 (1968); *Pacific Maritime Ass'n v. International Longshore. & W. U.*, 454 F.2d 262 (9th Cir. 1971); *Friend v. United States*, 388 F.2d 579, 581 (D.C. Cir. 1967). Moreover, the fact that answers and counterclaims have been filed by respondents after the renewed hearing on the application for a preliminary injunction was continued indefinitely demonstrates beyond any question that the lawsuit has not ended.

3. The decision of the Court of Appeals permitting respondents to recover for attorneys' fees and expenses, a liability not specified in the injunction bond, is in direct conflict with the decision of the Eighth Circuit in *International Ladies Garment Workers' Union v. Donnelly Garment Co.*, 147 F.2d 246 (8th Cir. 1945) *cert. denied*, 325 U.S. 852 (1945).

In the present case, the injunction bonds were posted by petitioners pursuant to Federal Rule 65(c) and, in conformity with the requirements of this rule, were conditioned to pay "costs and damages" incurred by any party found to have been wrongfully enjoined. The District Court did not require, and the bonds did not contain, any undertaking to pay reasonable at-

torneys' fees and expenses as provided in § 7 of the Norris-LaGuardia Act, and no objection was raised by respondents to the terms and conditions of the bond. Nevertheless, the Court of Appeals, contrary to the decision of the Eighth Circuit in *Donnelly, supra,* [8] concluded that the provisions of § 7 of the Norris-LaGuardia Act must be read into a bond filed in a § 301 injunction action, and held that respondents were, therefore, entitled to recover attorneys' fees and expenses under the injunction bond. The Third Circuit expressly declined to follow and apply the Eighth Circuit's decision in the *Donnelly* case, because, in its view, which it arrived at by tortured and erroneous reasoning, *Donnelly* and other cases which have followed it "are based upon a misinterpretation in *Heiser* [*v. Woodruff,* 128 F.2d 178 (10th Cir. 1942)] of the holdings of *Tullock v. Mulvane* [184 U.S. 497 (1902)] and *Oelrichs v. Spain* [82 U.S. 211 (1872)]". The Court of Appeals cites no authority for its holding that a bond posted in a § 301 injunction action conditioned to pay "costs and damages" must be construed to include liability for attorneys' fees and expenses by virtue of § 7 of the Norris-

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8. The Court of Appeals also recognized that its decision conflicted with *Madison Shipping Corp. v. National Maritime Union,* 204 F.Supp. 22 (E.D. Pa. 1962), and *Duke Power Co. v. Greenwood County,* 25 F.Supp. 419 (W.D.S.C. 1938). See, also, *Powelton Civic Home Owners Ass'n. v. H.E.W.,* 284 F.Supp. 809 (E.D Pa. 1968), and *Monolith Portland Midwest Co. v. Reconstruction Finance Corp.,* 128 F.Supp. 824,878 (S.D. Cal. 1955), which the Court of Appeals regarded as not being in point on the interpretation of the bond, while conceding that they support the proposition that attorneys' fees are not ordinarily an element of damages in the federal courts (Appendix B, p. 42, n. 5).

LaGuardia Act, and there is none. It is appropriate for this Court to resolve the conflict between the Third and the Eighth Circuit on this important issue, since the decision on this question will materially affect the type of bond to be given in every § 301 suit for injunctive relief in a federal court.

4. The decision of the Court of Appeals is also in direct conflict with the decision of the Eighth Circuit on the issue of whether respondents are entitled to recover an amount in excess of that specified in the injunction bonds. These bonds were posted pursuant to Federal Rule 65 (c) and approved by the District Court. No effort was ever made by respondents to obtain an increase in the amount of these bonds.[9] In spite of this, the Court of Appeals concluded that petitioners were liable to respondents for an amount substantially in excess of the limits of the bonds which had been posted.

The Court of Appeals again recognized that its decision on this question was in conflict with the decision of the Eighth Circuit in *International Ladies Garment Workers' Union v. Donnelly Garment Co., supra,* and with an earlier decision of the Eighth Circuit in *United Motors Service v. Tropic-aire,* 57 F.2d 479 (8th Cir. 1932), which the Third Circuit expressly declined to follow on the grounds that the Eighth Circuit had "misapprehended the holdings of the Supreme Court cases on which it relied" (Appendix B, p. 44). The *Donnelly* case holds that the monetary amount of an injunction bond, whether posted pursuant to Federal Rule 65 (c) or § 7 of the Norris-LaGuardia Act, is the limit of a

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9 7 Moore's Federal Practice, ¶65.09, p. 1657 (2nd ed., 1971).

plaintiff's liability and the measure of a defendant's protection for the wrongful issuance of an injunction. The *United Motors Service* case is to the same effect as to a bond posted under Federal Rule 65 (c) as is *West v. Zurhorst*, 425 F.2d 919 (2nd Cir. 1970), and *Atomic Oil Co. of Oklahoma, Inc. v. Bardahl Oil Company*, 419 F.2d 1097 (10th Cir. 1969).

The Third Circuit, asserting that no Supreme Court authority had been called to its attention holding that the liability of a plaintiff who has been improperly granted an injunction is limited to the amount of the bond he furnished, found the authority of the Eighth Circuit in *Donnelly* on this issue "unpersuasive" (Appendix B, pp. 46-47).

The reasoning of the Third Circuit in reaching the conclusion that respondents are not limited to the amount of injunction bonds is far more unpersuasive. It starts with the wholly unfounded assertion that the *Donnelly* approach "would rule out any liability for wrongfully obtaining an injunction in any case where the court did not require the posting of a bond" (Appendix B. p. 47). What the Court of Appeals completely overlooked is the fact that no injunction issued under Federal Rule 65 is effective unless and until an injunction bond is posted pursuant to Federal Rule 65(c). As the Court of Appeals for the Tenth Circuit aptly observed in *Atomic Oil Co. of Oklahoma, Inc. v. Bardahl Oil Company*, 419 F.2d 1097, 1100 (10th Cir. 1969): "Rule 65(c) states in mandatory language that the giving of security is an absolute condition precedent to the issuance of a preliminary injunction."

Moreover, the Court of Appeals' effort to distinguish the holdings of the cases upon which *Donnelly* relied is itself erroneous. Thus, *Lawrence v. St. Louis-San Francisco R. Co.*, 278 U.S. 228 (1929), is not a state court proceeding as the Court of Appeals asserts (Appendix B, pp. [illegible]), but involved a preliminary injunction issued by a federal court.[10]

Therefore, the decision of the Third Circuit holding petitioners liable for an amount in excess of that specified in the injunction bonds posted pursuant to Federal Rule 65(c) has created a serious conflict on a highly important question which this Court should resolve.

5. Quite apart from the conflict in the circuits created by the holding that petitioners are liable for an amount in excess of the injunction bonds, the basis upon which the Court of Appeals arrived at this result involves a serious misinterpretation of the language of § 7 of the Norris-LaGuardia Act and of the intent of Congress in adopting the bond provision. The key language is that "[n]o temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate

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10. Similarly, the Court of Appeals misread *Elgin J. & E. Ry. Co. v. Brotherhood of Railroad Trainmen*, 302 F.2d 540 (7th Cir. 1962), as standing for the proposition that the plaintiff's liability under § 7 of Norris-LaGuardia is open ended. It came to this conclusion because its reading of the circuit court and district court opinions did not disclose whether a bond was filed or, if so, in what amount. Actually, as the opinion of the district court clearly shows, the plaintiff there did post an injunction bond which provided the basis for recovery: *Elgin J. & E. Ry Co. v. Brotherhood of Railroad Trainmen*, 196 F.Supp. 158, 167 (N.D. Ill. E.D. 1961).

security in an amount to be fixed by the court sufficient to recompense those enjoined from any loss, expense or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order . . . ." (Appendix D, p. 56).

The Court of Appeals erroneously interpreted this language to mean that the court is to fix the amount of "adequate security" but not the extent of the complainant's "undertaking". This construction of § 7 leaves the plaintiff's liability completely open ended and is in direct conflict with the Eighth Circuit's decision in *Donnelly* that even under § 7 of the Norris-LaGuardia Act the liability of the plaintiff is limited to the penal sum of the injunction bond.

Properly read, the quoted language from § 7 means that the complainant must file "an undertaking . . . in an amount to be fixed by the court", and the words "with adequate security" are intended to modify the word "undertaking". So interpreted, the injunction bond is the limit of the plaintiff's liability.

This construction is not only consistent with the plain language of § 7 but is also supported by the legislative history of the Act. Thus, Wisconsin Senator John J. Blaine, one of the authors of the Act, in reporting on the bill to the Senate on February 24, 1932, stated:

> ". . . Finally, before such an order may be issued the complainants must furnish a bond sufficient to indemnify the defendants against any loss and expense, including costs and attorneys fees, resulting

from the issuance of the temporary restraining order if it is not sustained after a hearing." 72 Cong. Rec. 4630 (1932) (Remarks of Senator Blaine).

There is not the slightest suggestion in the legislative history of § 7 of the Norris-LaGuardia Act that Congress intended the plaintiff's liability on the "undertaking" to be open ended. As dissenting Judge Kalodner so aptly pointed out, the majority's construction of § 7 as permitting the respondents to recover in full their attorneys' fees and expenses in the same proceedings in which the injunction bonds were issued, even though they substantially exceed the aggregate amounts of the posted injunction bonds, is nothing more than impermissible judicial legislation, which clearly transgresses the procedural scheme of § 7.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES STEEL CORPORATION, *et al.* v. UNITED MINE WORKERS, *et al.*	Civil Action Nos. 70-724 70-725 70-727 70-728

Opinion

In these consolidated civil actions, the immediate matters before the Court are Motions for defendants for an award of reasonable costs, expenses and attorney fees. One group of attorneys have entered their appearances on behalf of the defendant Union, all of its Districts and Locals, and all of the individual defendants. The second group have entered their appearances in Civil Action 70-724 on behalf of Local 1248, in Civil Action 70-725 on behalf of Local 762, in Civil Action 70-727 on behalf of Local 762 and individual defendants Monborne and Krawitz, and in Civil Action 70-728 on behalf of defendant Trbovich. The defendants seek only those costs, expenses and attorney fees incurred in opposing plaintiffs' requests for preliminary injunctions in this Court on June 23, 24 and 25, 1970 and in appealing to the Circuit Court of Appeals from the Order of this Court dated June 25, 1970, granting the preliminary relief sought.[1]

1. By stipulation, the parties have agreed that costs and expenses have been advanced by Mr. Engle in

Appendix A.

The Court has conducted a hearing upon the Motions and considered the briefs and arguments of counsel. It is concluded that the Motions should be denied.

The actions sought to invoke the Court's jurisdiction under § 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §185. Plaintiffs requested preliminary injunctive relief compelling the defendants to cease from engaging in a work stoppage or picketing and to submit to the Settlement of Local and District Disputes provision of the National Bituminous Coal Wage Agreement of 1968.

Consolidated evidentiary hearing were conducted, arguments heard and briefs submitted during all of which time the aforementioned counsel represented the defendants. The Court entered Orders granting the plaintiffs' prayers for preliminary injunctions against all of the defendants named therein, and approved bonds in the amount of one thousand dollars, each conditioned as follows:

> "NOW, the condition of this obligation is such, that the plaintiff shall be liable to the defendants for such costs and damages, not exceeding the sum of $1,000.00, as defendants or any other person may sustain by reason of the Preliminary Injunction, if the Court finally decides that plaintiff is not entitled thereto."

Subsequent to the original decree, the Court entered a modifying order so as to exclude from the terms

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the amount of $730.94 and that reasonable attorney fees for services rendered by Mr. Engle are $3,380.00; by Mr. Owens, $1,120.00; by Mr. Joseph A. Yablonski, $3,580.00; by Mrs. Feldman, $1,640.00, and by Mr. Kenneth J. Yablonski, $900.00.

of the preliminary injunctions the defendant International Union.

In granting the preliminary injunctions it was concluded that the collective bargaining agreement provided a procedure, ultimately resulting in arbitration, which the parties to the agreement contemplated would be utilized to resolve a dispute of the nature in question.

Appeals from the Orders granting preliminary injunctions were perfected by all counsel for the defendants and the Court of Appeals reversed and remanded. In its Memorandum the Court stated:

> "We therefore summarily reverse and remand these cases to the district court without prejudice to a request for a hearing *de novo* on the application for a preliminary injunction. *We emphasize that we have not reached the issue of the merits of the request for a preliminary injunction.*" (Emphasis supplied.)

After remand, the plaintiffs requested a *de novo* hearing upon the applications for preliminary injunctions. The hearing was conducted and the parties stipulated to an indefinite continuance of the hearing upon conditions agreed to by the parties.

The question presented is whether the defendants are entitled to costs, expenses and reasonable attorney fees incurred in opposing the requests for preliminary injunctions in this Court and in prosecuting their successful appeals.

The Order of the Court of Appeals prescribes that each party is to bear its own costs. This determination is dispositive of the question of costs on appeal and can-

not be reconsidered here. It is also proper to infer from the aforementioned Order that each party is to bear his or its own expenses and attorney fees incurred on appeal.

There remains for consideration defendant's requests for costs, expenses and attorney fees incurred by the defendants in opposing the requests for preliminary injunctions in this Court. I conclude this request is prematurely made. It is the generally followed federal rule that there can be no recovery of damages caused by a preliminary injunction even if set aside, unless final judgment after trial is in favor of the party who has been enjoined. *Madison Shipping Corp. v. National Maritime Union,* 204 F. Supp. 22, 23 (E. D. Pa. 1962); *Meeker v. Stuart,* 188 F. Supp. 272, 276 (D. D. C. 1960), *aff'd,* 289 F. 902 (D. C. Cir. 1961), and cases cited therein; 3 Barron & Holtzoff, *Fed. Prac. & Proced.* § 1435 (1958).

There has been no final determination of plaintiffs' claims for injunctive relief. The Court of Appeals expressly reversed the trial court on procedural grounds alone and did not reach or consider the merits of the lower court's decrees. Due to the agreement and stipulation of counsel for the parties, the merits of plaintiff's requests have not been reached by this Court. In the present posture of the case, the requests for both preliminary and final injunctive relief remain pending before the Court. Absent any final determination upon the merits of the requests for injunctive relief, defendants are not entitled to recover.

This conclusion now made renders it unnecessary for the Court to decide whether the terms of Section 7 of

the Norris LaGuardia Act, 29 U. S. C. A. § 107, requiring security for reasonable attorney's fees and legal expenses, must be read into a bond filed precedent to the issuance of an injunction against concerted activity alleged to be in violation of a collective bargaining agreement.

An appropriate Order is entered.

Order.

Now, this 30th day of September 1970, defendants' Motions for costs, expenses and attorney fees are hereby denied without prejudice to their right to re-submit similar motions should the outcome of the proceedings warrant the same.

/s/ WALLACE S. GOURLEY, *SDJ,*
Senior District Judge.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 19,454 through 19,458

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UNITED STATES STEEL CORPORATION

v.

UNITED MINE WORKERS OF AMERICA; DISTRICT 4, UNITED MINE WORKERS OF AMERICA; DISTRICT 5, UNITED MINE WORKERS OF AMERICA; UNITED MINE WORKERS OF AMERICA LOCAL NO. 6321; UNITED MINE WORKERS OF AMERICA LOCAL NO. 1248

UNITED MINE WORKERS OF AMERICA
Appellant in 19,454

DISTRICT 4, UNITED MINE WORKERS OF AMERICA
Appellant in 19,455

DISTRICT 5, UNITED MINE WORKERS OF AMERICA
Appellant in 19,456

UNITED MINE WORKERS OF AMERICA LOCAL NO. 6321
Appellant in 19,457

UNITED MINE WORKERS OF AMERICA LOCAL NO. 1248
Appellant in 19,458

Appendix B.

Nos. 19,459 through 19,465

JONES & LAUGHLIN STEEL CORPORATION

v.

UNITED MINE WORKERS OF AMERICA; DISTRICT 4, UNITED MINE WORKERS OF AMERICA; DISTRICT 5, UNITED MINE WORKERS OF AMERICA; UNITED MINE WORKERS OF AMERICA LOCAL NO. 2399; UNITED MINE WORKERS OF AMERICA LOCAL NO. 762; UNITED MINE WORKERS OF AMERICA LOCAL NO. 6159; UNITED MINE WORKERS OF AMERICA LOCAL NO. 6330

UNITED MINE WORKERS OF AMERICA
Appellant in 19,459

DISTRICT 4, UNITED MINE WORKERS OF AMERICA
Appellant in 19,460

DISTRICT 5, UNITED MINE WORKERS OF AMERICA
Appellant in 19,461

UNITED MINE WORKERS OF AMERICA LOCAL NO. 2399
Appellant in 19,462

UNITED MINE WORKERS OF AMERICA LOCAL NO. 762
Appellant in 19,463

UNITED MINE WORKERS OF AMERICA LOCAL NO. 6159
Appellant in 19,464

UNITED MINE WORKERS OF AMERICA LOCAL NO. 6330
Appellant in 19,465

Appendix B.

Nos. 19,466 through 19,476

BETHLEHEM MINES CORPORATION

v.

UNITED MINE WORKERS OF AMERICA; DISTRICT 2, UNITED MINE WORKERS OF AMERICA, OWEN F. SLAGEL, President; UNITED MINE WORKERS OF AMERICA LOCAL NO. 1386, CHARLES KRAWETZ, President; UNITED MINE WORKERS OF AMERICA LOCAL NO. 850, EDWARD F. MONBORNE, President; UNITED MINE WORKERS OF AMERICA LOCAL NO. 1368, THOMAS WATSON, President; UNITED MINE WORKERS OF AMERICA LOCAL NO. 6394, JOSEPH T. MUCKO, JR., President; UNITED MINE WORKERS OF AMERICA LOCAL NO. 6411, ROBERT C. BROWN, President; DISTRICT 5, UNITED MINE WORKERS OF AMERICA, MICHAEL BUDZANOSKI, President; UNITED MINE WORKERS OF AMERICA LOCAL NO. 1190, CHARLES WASHLACK, President; UNITED MINE WORKERS OF AMERICA LOCAL NO. 2874, STANLEY C. WERSTLER, President; UNITED MINE WORKERS OF AMERICA LOCAL NO. 1197, JOHN A. DZIAK, President

UNITED MINE WORKERS OF AMERICA
Appellant in 19,466

DISTRICT 2, UNITED MINE WORKERS OF AMERICA, OWEN F. SLAGEL, President,
Appellant in 19,467

UNITED MINE WORKERS OF AMERICA LOCAL NO. 1386, CHARLES KRAWETZ, President. *Appellant in 19,468*

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UNITED MINE WORKERS OF AMERICA LOCAL NO. 850, EDWARD F. MONBORNE, President,

Appellant in 19,469

UNITED MINE WORKERS OF AMERICA LOCAL NO. 1368, THOMAS WATSON, President,

Appellant in 19,470

UNITED MINE WORKERS OF AMERICA LOCAL NO. 6394, JOSEPH T. MUCKO, JR. President,

Appellant in 19,471

UNITED MINE WORKERS OF AMERICA LOCAL NO. 6411, ROBERT C. BROWN, President,

Appellant in 19,472

DISTRICT 5, UNITED MINE WORKERS OF AMERICA, MICHAEL BUDZANOSKI, President,

Appellant in 19,473

UNITED MINE WORKERS OF AMERICA LOCAL NO. 1190, CHARLES WASHLACK, President,

Appellant in 19,474

UNITED MINE WORKERS OF AMERICA LOCAL NO. 2874, STANLEY C. WERSTLER, President,

Appellant in 19,475

UNITED MINE WORKERS OF AMERICA LOCAL NO. 1197, JOHN A. DZIAK, President,

Appellant in 19,476

Appendix B.

Nos. 19,477 through 19,481

REPUBLIC STEEL CORPORATION

v.

UNITED MINE WORKERS OF AMERICA; DISTRICT 4, UNITED MINE WORKERS OF AMERICA; DISTRICT 5, UNITED MINE WORKERS OF AMERICA; UNITED MINE WORKERS OF AMERICA LOCAL NO. 9873; UNITED MINE WORKERS OF AMERICA LOCAL NO. 688

UNITED MINE WORKERS OF AMERICA
Appellant in 19,477

DISTRICT 4, UNITED MINE WORKERS OF AMERICA
Appellant in 19,478

DISTRICT 5, UNITED MINE WORKERS OF AMERICA
Appellant in 19,479

UNITED MINE WORKERS OF AMERICA LOCAL NO. 9873
Appellant in 19,480

UNITED MINE WORKERS OF AMERICA LOCAL NO. 688
Appellant in 19,481

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued December 1, 1971

Before SEITZ, *Chief Judge*, KALODNER and GIBBONS, *Circuit Judges*

Appendix B.

Opinion of the Court

(Filed February 3, 1972)

GIBBONS, *Circuit Judge.*

Appellants, labor unions and individual union members, appeal from the order of the district court denying their motion for costs, expenses, and attorney's fees. *United States Steel Corp. v. United Mine Workers of America,* 317 F. Supp. 1070 (W.D. Pa. 1970). The dispute had its genesis in actions filed by the appellees, United States Steel Corporation, Jones & Laughlin Steel Corporation, Bethlehem Mines Corporation and Republic Steel Corporation seeking injunctions against work stoppages which they alleged were in violation of union contracts containing "Settlement of Local and District Disputes" grievance-arbitration procedures. The steel companies contended that by virtue of §301 of the Labor-Management Relations Act of 1947, 29 U.S.C. §185 (1971), the work stoppages should be enjoined pending resolution of the underlying disputes through the contract grievance arbitration procedures. After a two-day hearing the district court entered an order in each case granting a preliminary injunction. Each order contained the language:

> "Bond in the amount of $1,000.00 has been approved and filed with the Court by plaintiff."

A separate bond, identical in form, was filed by each plaintiff. The condition of the bond was in each case as follows:

> "WHEREAS, plaintiff has applied for a Preliminary Injunction against defendants, enjoining and restraining them from the commission of certain acts, as more particularly described in the Com-

plaint; NOW, the condition of this obligation is such, that the plaintiff shall be liable to the defendants for such costs and damages, not exceeding the sum of $1,000.00, as defendants or any other person may sustain by reason of the Preliminary Injunction, if the Court finally decides that plaintiff is not entitled thereto."

Neither the orders granting preliminary injunction nor the bond in any case made reference to the authority under which the court required that the bond be posted. The record discloses no opportunity for the defendants to examine the bond prior to its approval and filing.

The applications for preliminary injunctions were strenuously opposed by the defendants who contended that the work stoppage did not fall within the coverage of the contract grievance-arbitration provisions. When the orders were entered defendants promptly appealed. On their motion we summarily reversed. *Bethlehem Mine Corporation v. United Mine Workers of America,* No. 19,040 (3rd Cir., filed July 2, 1970). That reversal was on the ground that the district court because of an erroneous view of the applicable law had effectively denied the parties the opportunity to develop their respective positions in the abbreviated hearing which it conducted. The preliminary injunction was, therefore, improvidently granted. We remanded "without prejudice to a request for a hearing *de novo* on the application for a preliminary injunction." The order on remand specified, "Each side to bear its own costs."

After remand the plaintiffs renewed their request for a preliminary injunction and the district court set the matter down for a *de novo* hearing commencing July

9, 1970. Instead of proceeding with the hearing, however, the parties with the approval of the district court entered into a stipulation providing:

> "At the hearing, counsel for the respective defendants have represented to the Court that, to their knowledge, no picketing, work stoppage or strike exists at present and none is known to be anticipated in the immediate future. Also, counsel for the respective parties have agreed to an indefinite continuance of the hearing upon the oral stipulation that plaintiff, in good faith, will utilize its best efforts to comply with the Federal Coal Mine Health and Safety Act of 1969 and that counsel for the respective defendants, based upon the conditions in the mines as they are known to exist at present, will counsel the officers and membership of defendant-unions to refrain from any work stoppage or picketing at plaintiffs' mines.
>
> NOW, THEREFORE, this 10th day of July, 1970, in accordance with the represenations and stipulations of counsel, it is hereby Ordered that the hearing upon plaintiffs' application for preliminary injunction be continued until further notice by the Court."

The effect of this stipulation, although it purported to continue the hearing on plaintiffs' application for a preliminary injunction, was to end the lawsut for all practical purposes. By then the work stoppages complained of had ceased.

On August 14, 1970 the defendants moved for the award of reasonable costs, expenses and atttorneys' fees. This claim was based upon §7 of the Norris-LaGuardia Act, 29 U.S.C. §107 (1971) which in relevant part provides:

"No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity."

At the hearing on this motion the parties stipulated the amount of expenses incurred and the reasonable value of legal services rendered in opposing the preliminary injunctions and in procuring their reversal by this court.[1] The stipulated fees and expenses exceed $11,350.

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1. The parties have agreed that Mr. Engle advanced expenses of $730.94 and that a reasonable at-

00. The four bonds total $4,000.00. The district court denied the motion in its entirety "without prejudice to [defendants'] right to re-submit similar motions should the outcome of the proceedings warrant the same." This appeal followed.

The appellees moved before this court to dismiss the appeal on the ground that it was interlocutory. Another panel denied that motion without opinion, apparently on the ground that the order appealed from, although in form interlocutory, was in practical effect final on the issue here presented since no further proceedings would take place in the district court and was therefore appealable under the "collateral order" doctrine. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Green v. Singer Co.*, No. 71-1835 (3rd Cir., filed Nov. 2, 1971). Thus we must treat the appeal as a final decision denying defendants' motion for costs, expenses and attorneys' fees.

Since the reasonableness of the requested amounts has been stipulated the only question before us is whether on legal grounds the district court properly refused to make an award. Appellees advance several legal contentions in support of that conclusion.

First, appellees contend that because they brought suit under §301 of the Labor-Management Relations Act the procedural provisions of §7 of the Norris-LaGuardia Act are inapplicable. They urge that there is no warrant in law outside §7 for the award of counsel fees incurred in setting aside an injunction improvidently issued. As

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torney's fee for his services is $3,380.00; for Mr. Owens, $1,120.00; for Mr. Joseph Yablonski, $3,580.00; for Mrs. Feldman, $1,640.00; and for Mr. Kenneth J. Yablonski, $900.00.

authority for the proposition that §7 is inapplicable, appellees cite *Boys Markets, Inc. v. Local 770, Retail Clerks*, 398 U.S. 235 (1970).

Appellees read far too much into the *Boys Markets* opinion. In expressly overruling its earlier decision in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962), and in approving the analysis of the *Sinclair* dissent, the Supreme Court worked out a careful and narrow accommodation between the earlier Norris-LaGuardia Act and the later Labor-Management Relations Act. It held only that the express prohibitions against certain specific injunctions contained in §4 of Norris-LaGuardia, 29 U.S.C. §104, were deemed not to bar injunctions necessary to accomplish the purposes of the Labor-Management Relations Act through contract arbitration. The Court very carefully in Part V of the opinion, 398 U.S. at 253-55, made clear that it was dealing only with the prohibition of §4 of Norris-LaGuardia, and then only in cases where the court first holds that a strike is over a grievance which both parties are contractually bound to arbitrate. The opinion says nothing about the procedural steps which must be taken in making that determination or about the safeguards which must surround the issuance of a preliminary injunction.

The thrust of §4 of the Norris-LaGuardia Act is quite different from that of §7. The former is a list of injunctive orders which the federal district courts are flatly prohibited from entering. The latter is essentially a procedural section. It prohibits the entry of an injunction growing out of a labor dispute

> "except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint

made under oath, and testimony in opposition thereto, if offered . . .

Such hearing shall be held after due and personal notice . . ." 29 U.S.C. § 107.

Certainly the requirements of a verified complaint, notice and a hearing in open court in no way conflict with the policies of the Labor-Management Relations Act. Indeed FED. R. CIV. P. 65(a) requires as much in any event, *Sims v. Greene,* 161 F.2d 87 (3rd Cir. 1947), though that was not so when Norris-LaGuardia was passed since the federal rules had not yet been enacted. It was the failure to afford a hearing comporting either with §7 or with Rule 65(a) which led to the summary reversal of the preliminary injunction when this case was first before us.

It may be argued that some of the specific findings of fact required by §7[2] are inappropriate for a §301

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2. ". . . and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by

case. Obviously the Supreme Court thinks that most of them are quite appropriate, for in *Boys Markets* it quoted with approval the list of considerations bearing on the issuance of a §301 injunction first set forth in the *Sinclair* dissent.[3] The finding "[t]hat the public officers charged with the duty to protect complainant's property

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the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection."
29 U.S.C. §107.

3. "'A District Court entertaining an action under §301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract does have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity — whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance.' 370 U.S., at 228. (Emphasis in original.)" 398 U.S. at 254.

are unable or unwilling to furnish adequate protection," §7(e), 29 U.S.C. §107(e), probably would not be appropriate in a §301 case. But this does not mean that the entire section is inapplicable. It means only that as with §4 of Norris-LaGuardia §7 must be accommodated to the policy underlying §301.

For such an accommodation it is unnecessary to hold inapplicable to §301 cases those parts of §7 dealing with undertakings for loss, expense, or damage caused by the improvident or erroneous issuance of an injunction. It might be argued that by holding those parts of §7 applicable to §301 suits in the federal courts, we will impose a chilling effect on the resort by employers to the courts for enforcement of contract grievance-arbitration clauses. We hardly think so. In most cases the contract will be so clear one way or the other and the likelihood of damage to the union from a preliminary injunction requiring resort to contract arbitration so slight that the imposition of a §7 undertaking for loss, expense or damage caused by improvident or erroneous issuance will impose no significant burden. FED. R. CIV. P. 65(c) imposes an injunction bond requirement in any case and the only difference between a Rule 65(c) bond and one issued pursuant to §7 that the appellees have called to our attention is that the latter includes as an element of damage a reasonable attorneys' fee. That attorneys' fee would be paid only if the preliminary injunction is found to have been improvidently or erroneously issued, that is, where the Court did not hold a proper hearing or failed to make the factual determinations mandated by Part V of the *Boys Markets* opinion or where the court erroneously issued a preliminary injunction over a labor dispute not covered by the con-

tract grievance-arbitration provision. In any of these circumstances no necessary accommodation between the policies of Norris-LaGuardia and of the Labor-Management Relations Act requires that the union be deprived of the award of counsel fees under §7.

Appellees also suggest that if we recognize a liability for attorneys' fees in the circumstances of this case we will be creating a conflict between labor law in the state courts and labor law in the federal courts which the Supreme Court in *Boys Markets* sought to avoid. This is not so in cases in which a preliminary injunction should properly have issued under §301 since attorneys' fees in those cases will not be awarded. As to cases where a preliminary injunction should not have issued, the recognition in *Boys Markets* that the Norris-LaGuardia Act is still in force may in many states[4] result in different law being applied depending on the state or federal forum. But that is what Congress intended when Norris-LaGuardia was passed and, as the Supreme Court makes clear in *Boys Markets*, §301 of the Labor-Management Relations Act suggests an accommodation, not a repeal.

Thus we hold that the provision in §7 that a plaintiff shall file an undertaking for loss, expense or damage, including costs, together with a reasonable attorneys' fee before a preliminary injunction issues in a labor dispute applies in the federal courts even when the injunction is sought pursuant to §301.

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4. Though not in all states, New Jersey and Pennsylvania, for example, in their counterparts of the Norris-LaGuardia Act permit the recovery of attorneys' fees for the erroneous issue of an injunction against a labor union. *See* N.J.S.A. 2A: 15-51, 15-52, 15-53; 43 Pa. Stat. Ann §§206(f), 206(i), 206(j).

Next appellees contend that even assuming the applicability of §7 there may be no recovery here because the bond which was given was improper in form and in the absence of a proper bond the defendants have suffered *damnum absque injuria*. There is authority for appellees' position. *International Ladies' Garment Workers' Union v. Donnelly Garment Co.*, 147 F.2d 246 (8th Cir. 1945), *cert denied*, 325 U.S. 852 (1945).

Analysis of appellees' position requires a subdivision into several questions.

1. Does the bond which was filed, properly construed, exclude liability for attorneys' fees?

2. If the bond, properly construed, does not exclude liability for attorneys' fees, is the liability of the principal, as distinguished from the surety, limited to the amount of the bond?

3. If the bond, properly construed, is simply inapplicable to liability under §7, does that section impose liability on the plaintiffs by its own operation in the absence of a bond?

The *Donnelly* case, which is the only authority more or less directly in point, answers each of these questions in appellees' favor. *Donnelly* possibly may be distinguished on the basis of the Eighth Circuit's finding that ". . . it is beyond question that the bonds in this case were not required by the court nor given by the plaintiffs pursuant to the provisions of the Norris-LaGuardia Act." 147 F.2d at 253. Here there is nothing in the record specifying on what authority the bonds were required and the district court did not reach that question. Appellees contend that the language of the undertaking "shall be liable to the defendants for such costs and

damages" of necessity excludes liability for attorneys' fees. Besides the *Donnelly* case they cite for this proposition *Madison Shipping Corp. v. National Maritime Union,* 204 F. Supp. 22 (E.D.Pa. 1962) and *Duke Power Co. v. Greenwood County,* 25 F. Supp. 419 (W.D.S.C. 1938).[5] The authority relied upon in *Madison Shipping* is the *Donnelly* case. *Duke Power* relies upon the same federal authorities as does *Donnelly.* None of those authorities stands for the proposition that the word "damages" in a bond cannot include attorneys' fees. Rather, they stand for the proposition that as a matter of federal common law attorneys' fees are not a recoverable element of damages.

The case relied upon by the *Donnelly* and *Madison* courts and most often cited for the proposition that an injunction bond for costs and damages will not support a recovery of attorneys' fees is *Heiser v. Woodruff,* 128 F.2d 178 (10th Cir. 1942). *Heiser* relied upon *Tullock v. Mulvane,* 184 U.S. 497 (1902), and *Oelrichs v. Spain,* 82 U.S. 211 (1872). These cases make it clear that the issue is not the meaning of the word "damages" in the bond but whether as a matter of federal law attorneys' fees are ever recoverable as an element of damages. *Tullock v. Mulvane,* which involved a suit for specific performance, recognizes that if Kansas law were to be applied the bond would have sustained the award of at-

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5. Appellees also cite *Powelton Civic Home Owners Ass'n. v. H.E.W.,* 284 F. Supp. 809 (E.D.Pa. 1968); *Monolith Portland Midwest Co. v. Reconstruction Finance Corp,* 128 F. Supp. 824, 878 (S.D.Cal. 1955). These cases are not in point on the interpretation of the bond, even though they do support the proposition that attorneys' fees are not ordinarily an element of damages in the federal courts.

torneys' fees. Accepting *Tullock v. Mulvane* and *Oelrichs v. Spain* as correct statements of the federal common law with respect to the recovery of attorneys' fees as an element of damages whether or not a bond has been given, it is obvious that the federal common law was changed for labor disputes when Congress enacted §7 of the Norris-LaGuardia Act. Thus the fact that the bond did not track the language of §7 exactly should not be dispositive. Whatever the law is in other cases, in a labor dispute attorneys' fees incurred in defending against an application for an injunction which should not have been granted are a recoverable element of damages. If in a labor dispute the plaintiff seeking a preliminary injunction tenders and the court approves a bond for "costs and damages" that undertaking should be construed to include all the elements of damage which are recoverable under §7. Since *International Ladies' Garment Workers' Union v. Donnelly Garment Co., supra,* and *Madison Shipping Corp. v. National Maritime Union, supra,* are based upon a misinterpretation in *Heiser* of the holdings of *Tullock v. Mulvane* and *Oelrich v. Spain,* we decline to follow these authorities insofar as they hold that the injunction bond for costs and damages may not be so construed.

This brings us to the question whether recovery should be limited to the amount of the bond. Here, again, appellees take comfort in the *Donnelly* case, which says:

> "The weight of authority in the Federal courts is that a recovery in excess of the maximum amount stipulated in a judicial bond is not permissible. United Motor Service, Inc. v. Tropic Aire, Inc., 8 Cir. 57 F.2d 479, 482, reviewing the prior decisions of this court and other Federal courts. And see

> Russel v. Farley, 105 U.S. 433, 437, 26 L.Ed. 1060; Meyers v. Block, 120 U.S. 206, 211, 7 S.Ct. 525, 30 L.Ed. 642; Lawrence v. St. Louis-San Francisco R.Co., 278 U.S. 228, 233, 147 F.2d at 253.

We can put to one side the surety's liability, for entirely different legal principles operate to limit its liability to the amount of its undertaking. Restatement of Security §195 (1941). The obligation of the principal, the plaintiff seeking injunctive relief, raises a different issue, and again the Eighth Circuit both in *Donnelly* and in *United Motors Service v. Tropic-Aire,* 57 F.2d 479 (1932), misapprehended the holdings of the Supreme Court cases on which it relied.

It was once very much in doubt whether an equity court could ever award damages. That doubt remained in England until the passage of the Chancery Amendment Act in 1858, commonly called Lord Cairn's Act, St. 21 & 22 Vict. c. 27, granting to the court of chancery jurisdiction to award damages in order to give complete relief in a case otherwise properly within its jurisdiction. *See* 1 J. Pomeroy, Equity Jurisprudence §237(e) (5th ed. 1941). The same doubt about the power of an English equity court to award damages existed in the United States. In *Bein v. Heath,* 53 U.S. (12 Howard) 168, 178-79 (1851), Chief Justice Taney wrote:

> "A court proceeding, according to the rules of equity, cannot give a judgment against the obligors in an injunction bond when it dissolves the injunction. It merely orders the dissolution, leaving the obligee to proceed at law against the sureties, if he sustains damage from the delay occasioned by the injunction."

Russell v. Farley, 105 U.S. (15 Otto) 433, 445 (1881), referring to *Bein v. Heath, supra,* rejected Chief Justice Taney's dictum, saying:

> "Other cases are referred to by counsel of the appellants to sustain their position, but upon a careful examination we are not satisfied that they furnish any good authority for disaffirming the power of the court having possession of the case, in the absence of any statute to the contrary, to have the damages assessed under its own direction. This is the ordinary course in the Court of Chancery in England, by whose practice the courts of the United States are governed, and seems to be in accordance with sound principle."

The holding of *Russell v. Farley,* then, is that a court of equity can, in order to give complete relief, enter judgment on an injunction bond. The case also contains a dictum which has been fairly frequently cited for the proposition that the bond is the only source of the defendant's liability.

> "Where no bond or undertaking has been required, it is clear that the court has no power to award damages sustained by either party in consequence of the litigation, except by making such a decree in reference to the costs of suit as it may deem equitable and just." 105 U.S. (15 Otto) at 437.

In *United Motors Service v. Tropic-Aire,* 57 F.2d at 482, the Eighth Circuit treated this dictum as a statement that in the absence of a bond *no* court could award damages for wrongfully obtaining an injunction. But in the context of *Russel v. Farley* it seems clear that no more was intended than to suggest that such an award was not within the jurisdiction of a court of equity.

Appendix B.

Both in *Donnelly* and in *United Motors Service* reference is made to *Minneapolis, St. P. & S. Ste. M. Ry. v. Washburn Lignite Coal Co.*, 254 U.S. 370 (1920). *United Motors Service*, 57 F.2d at 483, refers to *Minneapolis, St. P. & S. Ste. M. Ry. v. Washburn Lignite Coal Co.* as holding that in the absence of a bond damage arising from an injunction is *damnum absque injuria*. Actually the case holds no such thing. It dismisses a writ of error from the Supreme Court of North Dakota because of an adequate state ground of decision. The reference to the injunction bond is to the state court's application, or more properly misapplication, of the dictum in *Russell v. Farley, supra.*

Both *Donnelly* and *United Motors Service* cite *Lawrence v. St. Louis-S. Fran. Ry.*, 278 U.S. 228 (1929). The holding in *Lawrence* is that the court need not entertain an action to recover on the bond prior to the hearing on a permanent injunction. There is a one sentence dictum, citing *Russell v. Farley, supra, and Minneapolis, St. P. & S. Ste. M. Ry. v. Washburn Lignite Coal Co., supra,* "If it had not, when entering the interlocutory decree, required that the bond be given, no damages could have been recovered on the dissolution of the injunction." 278 U.S. at 233. No signicance can be attached to this dictum since it, like the reference in the *Minneapolis Ry.* case, refers to a proceeding in a state court and hence, in all likelihood, to a matter of state court equity practice similar to the question of federal court equity practice involved in *Russell v. Farley, supra.*

No Supreme Court authority which has been called to our attention holds that the liability of a plaintiff who has been improperly granted an injunction is limited to the amount of the bond he has furnished, and we

find the authority of *International Ladies' Garment Workers' Union v. Donnelly Garment Co., supra,* on this issue unpersuasive. *Cf. Atomic Oil Co. v. Bardahl,* 419 F.2d 1097 (10th Cir. 1969).

The *"damnum absque injuria"* approach of the *Donnelly* case would rule out any liability for wrongfully obtaining an injunction in any case where the court did not require the posting of a bond. It has often been said that as a rule there is no liability in tort for the damages caused by the wrongful suing out of an injunction. *See, e.g., Benz v. Compania Naviera Hidalgo S.A.,* 205 F.2d 944, 948 (9th Cir. 1953); 42 Am. Jur. 2d *Injunctions* §359 (1969); 43 C.J.S. *Injunctions* §281 (1945). This rule is an aspect of the more general rule that no action lies against a party for resort to civil courts, and it is subject to the same qualification that an action will lie even in the absence of a bond for proceeding maliciously without probable cause. *See, e.g., Dacey v. Lawyers' Association,* 423 F.2d 188, 195 (2nd Cir. 1969); *Soffos v. Eaton,* 152 F.2d 682 (D.C. Cir. 1945); *Melvin v. Pence,* 130 F.2d 423 (D.C. Cir. 1942); *American Optometric Association v. Ritholz* 101 F.2d 883 (7th Cir. 1939); *Peckham v. Union Finance Co.,* 48 F.2d 1016 (D.C. Cir. 1931); *Mayflower Industries v. Thor Corp.,* 15 N.J. Super. 139, 152, 83 A.2d 246, 252 (Ch. Div. 1951); F. Harper & F. James, *The Law of Torts* §4.8 at 326 (1956). Probably the possibility of a recovery against a plaintiff who had proceeded without probable cause was the reason why Congress added the last sentence of §7 of the Norris-LaGuardia Act, 29 U.S.C. §107:

> "But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity."

Thus the civil action for proceeding maliciously without probable cause still exists in labor dispute cases.

The question, then, is how far Congress intended to go beyond the remedy which existed at common law. Section 7 does say that an amount shall "be fixed by the court," but in the context this language seems to modify the words "adequate security" rather than the word "undertaking." Read thus, the amount to be fixed by the court refers to the limit of liability of a surety or the amount of collateral security required in the absence of a surety. The plaintiff's required undertaking would then read "sufficient to recompense those enjoined for any loss, expense, or damage . . . including all reasonable costs (together with a reasonable attorney's fee) and expenses of defense against the order . . .". Such a reading would permit recovery against the plaintiff in excess of the amount fixed in the bond. The language "[n]o temporary injunction shall be issued except on condition" seems to make the undertaking to recompense for damage an implied condition of every labor dispute injunction. Such a reading would permit recovery even in the absence of a bond. One district court considering that issue, wrote:

> "While the statute provides for a bond, and, while it is manifestly true that the bond did not comply with the provisions of the statute, it might be that the labor unions, or, parties, would be entitled to their expenses, and attorney's fees, in accordance with this statute, even though no bond were given, but the statute does not so say. A liberal construction though should be allowed to accomplish its purpose. It could hardly mean that expenses were to be allowed, only, if the bond were given." *Hous-*

ton & North Texas M. F. Lines v. Local 745, Teamsters, 27 F. Supp. 262 (N.D.Tex. 1939).

The quote is a dictum only, and a similar dictum, citing the *Houston & North Texas M. F. Lines* case appears in *Jamaica Lodge 2188, Railway Clerks v. Railway Express Agency, Inc.,* 200 F.Supp. 253, 254 (E.D. N.Y. 1961). In *Elgin J. & E. Ry. Co. v. Brotherhood of Railroad Trainmen,* 302 F.2d 540, 545 (7th Cir. 1962) the court affirmed the award of expenses and attorneys' fees. Neither the Seventh Circuit opinion nor that of the district court, 196 F.Supp. 158 (N.D.Ill. 1961) disclose whether a bond was filed or if so in what amount. The district court reserved decision for the purpose of fixing the amount of the award until after the mandate on any appeal should issue. Thus the *Elgin* case may be interpreted as recognizing that the plaintiff's liability under §7 is open ended.

Several considerations lead us to the conclusion that the liability of the plaintiff for loss, expense or damage under §7 was not intended by Congress to be restricted solely to the amount of whatever bond the court may have required. These are:

(1) the language of the statute to which we have referred above;

(2) the fact that the statute changed the substantive law with respect to the recoverability of attorneys' fees;

(3) the fact that the statute recognizes a liability for resort to the civil process in cases where an action for malicious prosecution would not lie; and

(4) the remedial purpose intended by Congress.

The fourth consideration is particularly compelling. The enactment of the Norris-LaGuardia Act reflected a judgment that at least in the period prior to 1932 the judges of federal district courts were entirely too willing to accede to requests by employers for injunctions against labor unions. *See Boys Markets, Inc. v. Local 770, Clerks Union,* 398 U.S. at 250-51; F. Frankfurter & N. Greene, The Labor Injunction (1930). It is hardly logical to read §7 so that the extent of the new liability for loss, expense, or damage which it created would depend entirely on the unbridled discretion of these same district court judges against whom the whole statute was directed. Yet that is the very result of the *Donnelly* decision. The atmosphere of the federal courts in labor cases may well have changed since 1932, but Congress has not seen fit to amend §7.

We hold, then, that in any case involving a labor dispute the liability of the plaintiff, though not of any surety, for loss expense or damage, including attorneys' fees, under §7 of the Norris-LaGuardia Act shall be fixed by the court without regard to any limitation in an injunction bond. Since in each of the instant cases a bond was filed we are not required to decide what the result should be in case where no undertaking was filed.

The amount of expenses and of reasonable attorneys' fees have been stipulated. The record does not disclose whether the stipulated amounts of expenses included statutory costs on appeal in the prior appeal. In that appeal we held that each party should bear its own statutory costs. These amounts should not be included in the judgment.

The order of the district court will be reversed and the cases remanded to the district court for the entry

of a judgment awarding the stipulated attorneys' fees and the stipulated expenses except for statutory costs on the prior appeal.

KALODNER, *Circuit Judge,* concurring in part and dissenting in part:

I agree with the reversal of the District Court's Order.

I disagree, however, with the majority's direction to the District Court to enter a judgment *in the instant proceedings,* awarding the stipulated attorneys' fees and expenses, except for statutory costs on the prior appeal.

In my opinion, since the defendants below have elected to seek recovery of their reasonable attorneys' fees and expenses *in the same proceedings* in which the preliminary injunctions were improvidently issued they are for that reason limited in their recovery to the amounts specified in the injunction bonds posted in these proceedings, under Section 7(e) of the Norris-LaGuardia Act. 29 U.S.C.A. § 107 (e).

Section 7(e) provides in relevant part:

". . . No temporary restraining order or temporary injunction shall be issued except on condition that *complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any in-*

junctive relief sought in the same proceeding and subsequently denied by the court.

"The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. *But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.* Mar. 23, 1932, c. 90, §7, 47 Stat. 71." (emphasis supplied).

The cited provisions plainly spell out two separate and independent procedures for recovery of reasonable attorneys' fees and expenses incurred by a party against whom a temporary injunction has been improvidently granted; he may elect to have recourse against the injunction bond *in the same proceeding in which it was posted,* or he may *independently elect* "to pursue his ordinary remedy by suit at law or in equity" for his recovery. It is a reasonable assumption that Congress, cognizant of the well-settled general rule that the liability on an injunction bond is limited by its face amount, legislated the provision affording a right of independent suit for recovery of permissible attorneys' fees and expenses in order to insure full reimbursement of such fees and expenses.[1]

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1. The majority speculates that "[p]robably the

Here, the majority construes Section 7(e) to permit the aggrieved parties to recover in full their attorneys' fees and expenses *in the same proceedings* in which the injunction bonds were issued, even though they substantially exceed the aggregate amounts of the posted injunction bonds.

There is no warrant for such a construction, and it can only be described as impermissible judicial legislation. The majority has failed to cite any case which even remotely affords nourishment for its construction, even though it transgresses the procedural scheme of Section 7(e).

I would reverse the District Court's Order with directions to enter a judgment awarding the defendants below $4,000.00, the aggregate amount of the injunction bonds posted by the plaintiffs, in the event that the defendants do not choose to exercise their right to withdraw their pending Motion for allowance of the stipulated attorneys' fees and expenses.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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possibility of a recovery against a plaintiff who had proceeded without probable cause was the reason why Congress added the last sentence of §7 of the Norris-LaGuardia Act, 29 U.S.C. §107."

The ready answer to such speculation is that §7(e) provides that recovery of reasonable attorneys' fees and expenses arises, without more, when there has been an "improvident or erroneous" issuance of a temporary restraining order, and accordingly, lack of "probable cause" is an irrelevant consideration.

APPENDIX C

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge* and KALODNER and GIBBONS, *Circuit Judges*

Judgment

These causes came on to be heard on the records from the United States District Court for the Western District of Pennsylvania and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed September 30, 1970, be, and the same is hereby reversed, and the causes remanded to the said District Court for the entry of judgment awarding the stipulated attorneys' fees and the stipulated expenses except for statutory costs on the prior appeal, in accordance with the opinion of this Court. Costs taxed against appellees.

ATTEST:

THOMAS P. QUINN
Clerk

February 3, 1972

APPENDIX D

Statutes Involved

Section 7 of the Norris-LaGuardia Act (47 Stat. 71, 29 U.S.C. §107) reads as follows:

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking mentioned in this section shall be understood to signify an agreement entered into by the

complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

Section 301 (a) of the Labor-Management Relations Act of 1947 (61 Stat. 156, 29 U.S.C. § 185 (a)) reads as follows:

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Rule 65(c) of the Federal Rules of Civil Procedure reads as follows:

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.